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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

PAUL SCHMIDT, JANE W. SCHMIDT and LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation, individually and as use beneficiee of E. L. Harlin,

Petitioners,

vs.

ARCHER IRON WORKS, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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This Result Was Accomplished In The Instant (And Other Undefined Classes Of Cases) By Changing The Principle Of Law For Directed Verdict And Judgment N.O.V. To A Vague And Ambiguous Principle Which Involves The Highest Court In Such Jury Functions As Re-Assessing Credibility, Re-Examining Inferences To Be Drawn, Re-Weighing The Evidence And Replacing The Jury 8

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In The

Supreme Court of the United States

October Term, 1970

No.

PAUL SCHMIDT, JANE W. SCHMIDT and LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation, individually and as use beneficiee of E. L. Harlin,

Petitioners,

vs.

ARCHER IRON WORKS, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois which reversed a judgment of the Intermediate Appellate Court finding adequate evidentiary basis for verdicts aggregating over $300,000. This judgment of the Supreme Court was rendered on January 28, 1970, a petition for rehearing having been denied on March 23, 1970. The maiming injuries to one of the petitioners has deprived his wife and 5 children of his support.

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois, as yet unreported in the Illinois Reports, appears at Appendix A. This opinion reversed the Appellate Court of Illinois, First District, whose opinion is reported in 98 Ill. App. (2) 82, 240 N.E. (2d) 794 and is set forth in Appendix B. This opinion of the Appellate Court reversed the trial court's judgment n.o.v. with directions to reinstate the judgments entered originally on the jury's verdict. The opinion of the trial court in settting aside the jury verdict and in entering judgment n.o.v. is set forth in Appendix C.

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on January 28, 1970. A Petition for Rehearing was filed within the time allowed by Rules of Court and was denied on March 23, 1970. This petition for certiorari was filed less than 90 days from said date.

The jurisdiction of this Court is invoked under 28 USCA Section 1257 (3).

QUESTIONS PRESENTED.

Is the Fourteenth Amendment violated by the 1967 judicial abrogation of the right to a jury in undetermined class of prima facie cases and applied to 1954 occurrence resulting in nullification of 1964 verdicts aggregating over $300,000.00?

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUMMARY OF POINTS AND AUTHORITIES FOR GRANTING CERTIORARI.

I.

ILLINOIS, THROUGH ITS HIGHEST COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY ABROGATING THE PLAINTIFFS' (AND OTHER UNDEFINED PERSONS') RIGHT TO JURY TRIAL IN UNSPECIFIED CASES, SUCH AS PRIMA FACIE CASES OR CASES "CLOSE ON THE FACTS", AS THAT RIGHT EXISTED AND VESTED WHEN THE PLAINTIFFS' ACTION ACCRUED AND VERDICTS WERE RETURNED.

THIS RESULT WAS ACCOMPLISHED IN THE INSTANT (AND OTHER UNDEFINED CLASSES OF CASES) BY CHANGING THE PRINCIPLE OF LAW FOR DIRECTED VERDICT AND JUDGMENT N.O.V. TO A VAGUE AND AMBIGUOUS PRINCIPLE WHICH INVOLVES THE HIGHEST COURT IN SUCH JURY FUNCTIONS AS RE-ASSESSING CREDIBILITY, RE-EXAMINING INFERENCES TO BE DRAWN, RE-WEIGHING THE EVIDENCE AND REPLACING THE JURY.

A. Plaintiffs' Right to a Jury at Time of Injuries and Verdicts (in 1954 and 1964 Respectively).

Duffy v. *Cortesi*, 2 Ill. (2d) 511, 521, 119 N.E. (2d) 241 (1954).

Robinson v. *Workman*, 9 Ill. (2d) 420, 137 N.E. (2d) 804 (1956).

Hocker v. *O'Klock*, 16 Ill. (2d) 414, 419, 158 N.E. (2d) 7 (1959).

B. 1967 Abrogation of Juries in Prima Facie Cases.

Pedrick v. *Peoria & Eastern R. R. Co.*, 37 Ill. (2d) 494, 510, 229 N.E. (2d) 504, 513 (1967).

Schmidt v. *Archer Iron*, 98 Ill. App. (2d) 82, 240 N.E. (2d) 794 (1968).

Schneideman v. *Interstate Transit Lines,* 401 Ill. 172, 81 N.E. (2d) 861 (1948).

Corcoran v. *City of Chicago,* 373 Ill. 567, 580, 27 N.E. (2d) 451 (1940).

McElroy v. *Force,* 75 Ill. App. (2d) 441, 220 N.E. (2d) 761 (1966).

Winston v. *Sears Roebuck,* 88 Ill. App. (2d) 358, 233 N.E. (2d) 95 (1968).

C. Fourteenth Amendment Violated by 1967 Judicial Abrogation of Right to Jury in Undetermined Class of Prima Facie Cases and Applied to 1954 Injuries Resulting in Nullification of 1964 Verdicts Aggregating Over $300,000.

United States Constitution, Fourteenth Amendment.

Armstrong v. *Manzo,* 380 U.S. 545.

Brinkerhof v. *Hill,* 281 U.S. 673 (1930).

Tennant v. *Peoria & P. U. Ry. Co.,* 321 U.S. 29, 35 (1943).

Braley v. *Gladden,* 403 F. (2d) 858 (9th Cir. 1968).

Adelman v. *Adelman,* 296 NYS (2d) 999, 58 Misc. (2d) 803 (1969).

2 Cooley, Constitutional Limitations, page 756.

Fortney v. *Hotel Rancroft,* 5 Ill. App. (2d) 327, 125 N.E. (2d) 544 (1955).

D. Certiorari Lies to Review Federal Question Arising in Highest Court of State and Raised by Petition for Rehearing.

Brinkerhof v. *Hill,* 281 U.S. 673, 682 (1930).

Great Northern Ry. v. *Sunburst,* 287 U.S. 358 (1932) (certiorari to Sup. Ct. of Montana).

28 USCA Section 1257(3).

STATEMENT OF FACTS.

This is an action by a carpenter for extensive injuries sustained when a part of an Archer Iron Works concrete pouring tower fell upon and maimed him at the site of the construction of a bridge spanning the Missouri River. Count II was by his wife for loss of consortium and Count III was the Workmen's Compensation insurer's subrogation claim.

The jury returned verdicts against Archer as manufacturer. They found for the injured carpenter in the sum of $250,000. His wife's damages for loss of consortium was assessed in the sum of $15,000, and the compensation insurer's verdict was in the amount of payments, namely $35,871.58.

The defendant filed a post trial motion asking for judgment n.o.v. and for a new trial. The new trial was denied but the former was granted. The plaintiffs appealed from those judgments notwithstanding the verdicts for the respective plaintiffs and the Appellate Court reinstated the judgments on the original verdicts. The Illinois Supreme Court reversed the Appellate Court and affirmed the trial court.

The plaintiffs contend that there was sufficient evidence (by direct testimony and circumstantial evidence with all reasonable inferences that a jury could draw) of every element of the defendant's liability to warrant submission of the case to the jury including the only contested issue, namely, the manufacture, sale and delivery of the concrete pouring tower and its parts by Archer,

including the painted defective factory welded part which broke. The Appellate Court held there was an evidentiary basis for the verdicts.

The Supreme Court of Illinois in this case followed a 1967 decision in reversing the Appellate Court findings of fact. On petition for rehearing the plaintiffs argued that the 1967 decision was not in effect at time of injury or rendition of verdict and improperly deprived plaintiffs of the right to trial by jury as it existed at time of injury or at time of rendition of verdicts. The plaintiffs further argued that their rights under the 14th Amendment were violated by the Illinois Supreme Court's evaluating the trial and verdicts by standards created after verdict. These standards, it was argued, destroy the right to trial by jury in this and other undetermined classes of trials where the plaintiff makes out the age-old "prima facie case" or where the case is "close on the facts," notwithstanding that jury verdicts are sustained on presumption alone.

These contentions on Petition for Rehearing were denied by the Supreme Court of Illinois.

These constitutional guarantees, though called to the Court's attention in the Petition for Rehearing, were nevertheless rejected by order without further opinion.

REASONS FOR GRANTING CERTIORARI.

I.

ILLINOIS, THROUGH ITS HIGHEST COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY ABROGATING THE PLAINTIFFS' (AND OTHER UNDEFINED PERSONS') RIGHT TO JURY TRIAL IN UNSPECIFIED CASES, SUCH AS PRIMA FACIE CASES OR CASES "CLOSE ON THE FACTS", AS THAT RIGHT EXISTED AND VESTED WHEN THE PLAINTIFFS' ACTION ACCRUED AND VERDICTS WERE RETURNED.

THIS RESULT WAS ACCOMPLISHED IN THE INSTANT (AND OTHER UNDEFINED CLASSES OF CASES) BY CHANGING THE PRINCIPLE OF LAW FOR DIRECTED VERDICT AND JUDGMENT N.O.V. TO A VAGUE AND AMBIGUOUS PRINCIPLE WHICH INVOLVES THE HIGHEST COURT IN SUCH JURY FUNCTIONS AS RE-ASSESSING CREDIBILITY, RE-EXAMINING INFERENCES TO BE DRAWN, RE-WEIGHING THE EVIDENCE AND REPLACING THE JURY.

A. Plaintiffs' Right to a Jury at Time of Injuries and Verdicts (in 1954 and 1964 Respectively).

The occurrence by which the plaintiffs sustained injury and damages took place on August 5, 1954. The maiming injuries to Paul Schmidt deprived a wife and five children of their support. The action below was filed August 4, 1956, and verdicts aggregating over $300,000 plus interest were returned June 2, 1964. Judgment for defendant notwithstanding the verdicts was rendered May 20, 1965.

At the time plaintiffs' actions accrued and verdicts were returned, the Illinois law was that if there was

"any" evidence to support the verdict of the jury, judgment n.o.v. could not be granted, and this same principle prevailed on review of the Appellate Court judgment by the Supreme Court of Illinois. *Duffy* v. *Cortesi*, 2 Ill. (2d) 511, 521, 119 N.E. (2d) 241 (1954): (page 245)

> "In addition to the foregoing ground for reversal plaintiffs urge that the verdicts of the jury were unsupported by any evidence in the record. Under the Civil Practice Act the Supreme Court is authorized to re-examine cases brought to it by appeal from the Appellate Court only as to questions of law (Ill. Rev. Stat. 1953, chap. 110, §§ 213, 216(3) (b).) It is established, however, that it is a question of law whether there is ANY evidence in the record to support a particular finding." [Emphasis added]

The principle "any" evidence was sufficient to reverse a judgment for defendant notwithstanding a verdict for the plaintiff because a "presumption" against unlawful acts and in favor of the "instinct" of self-preservation was sufficient to make out a prima facie case. *Robinson* v. *Workman*, 9 Ill. (2d) 420, 137 N.E. (2d) 804 (1956): (page 808)

> "We cannot agree that there was insufficient evidence to support the plaintiff's allegations. We must consider not only the proof itself but also the presumptions which arise by operation of the law. This court has frequently held that every presumption will be indulged against unlawful acts, *Tuthill* v. *Rendelman*, 387 Ill. 321, 56 N.E. 2d 375; *Stephens* v. *Collison*, 330 Ill. 48, 161 N.E. 68; *White* v. *Bates*, 234 Ill. 276, 84 N.E. 906; *Russell* v. *Baptist Theological Union*, 73 Ill. 337; 5 Am. Jur., Automobiles, sec. 605, p. 838, and in favor of the human instinct of self-preservation and avoidance of danger. *Consumers Co.* v. *Industrial Comm.*, 364 Ill. 145, 4 N.E. 2d 34, 107 A.L.R. 811; *Cleveland, Cincinnati, Chicago & St.*

Louis Railway Co. v. *Keenan,* 190 Ill. 217, 60 N.E. 107; *Casey* v. *Chicago Railways Co.,* 269 Ill. 386, 109 N.E. 984, L.R.A. 1916B, 824. It has also been held in automobile injury cases, that proof of ownership raises a presumption that the machine was under the defendant's control at the time of the accident, and the burden of rebutting this inference then passes to the latter. *Kavale* v. *Morton Salt Co.,* 329 Ill. 445, 160 N.E. 752; *Watt* v. *Yellow Cab Co.,* 347 Ill. App. 307, 106 N.E. 760; *Rose* v. *Ruan Transport Corp.,* 7 Cir., 214 F. 2d 583; 61 C.J.S., Motor Vehicles, § 511, p. 226. Yet, in this case, the Appellate Court completely ignored these principles to say, in effect, that Robinson was operating the automobile without a driver's license, that he at that time abandoned his usual careful habits, and that defendant's car was being driven by a man who had not been known to drive for the past 15 to 20 years. Further evidence of that court's failure to properly evaluate the testimony is shown by its statement that 'It is not clear whether or not this shoe belonged to Workman * * *,' when, in fact, the shoe found pinned to the accelerator was later positively identified by both Workman's wife and niece as belonging to the defendant.

Although it is true that plaintiff's case was largely circumstantial, it was the highest degree of proof that was available under these conditions, and unless liability is to be denied in all such instances, it must be accorded the same judicial concern as are other types of evidence."

The "any" evidence principle for reviewing judgments n.o.v. on appeals from the Appellate Court to the Supreme Court of Illinois continued through 1964. *Hocker* v. *O'Klock,* 16 Ill. (2d) 414, 419, 158 N.E. (2d) 7 (1959); *Tankersley* v. *Peabody Coal Co.,* 31 Ill. (2d) 496, 505, 202 N.E. (2d) 498 (1964).

B. 1967 Abrogation of Juries in Prima Facie Cases.

Thereafter in May of 1967, the Supreme Court of Illinois announced the *Pedrick* rule as follows:

> ". . . In our judgment verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick* v. *Peoria & Eastern R.R. Co.*, 37 Ill. (2d) 494, 510, 229 N.E. (2d) 504, 513.

In January, 1970, the Supreme Court of Illinois decided the instant case by the *Pedrick* rule stating that all evidentiary phases of the case were undisputed except one, and that the issue to be determined was expressed by the Court as follows:

> "This case is unusual in that it is undisputed that the eye pin was defectively manufactured and that this defect was the proximate cause of the plaintiff's injuries. The narrow issue before us is whether there is SUFFICIENT EVIDENCE that the defendant furnished the defective pin TO JUSTIFY THE JURY"S VERDICT." [Emphasis added] (Opinion page 2).

The Supreme Court of Illinois then stated the evidence favorable to the defendant and assessed the credibility of some witnesses by indicating that they "testified unequivocally" or as to others said what they believed was "clear" from evidence or what they believed some witnesses did or did not do.

Previously, in September of 1968, the Intermediate Appellate Court reviewed the evidence of record in the instant case and concluded in pertinent part: (page 4)

"On the other hand, it is but common sense that if it was provable that Pacific did acquire this boom spout bridle elsewhere, Archer had an impregnable defense. It strains credulity to the breaking point to believe that such a defense was available and not used. With a tower completely functionable on a swivel basis THE REASONABLE INFERENCES ARE THAT THE BOOM SPOUT BRIDLE CAME WITH THE EQUIPMENT."

(page 5)

"It seems to us to be pure speculation from this record to assume that Pacific had a boom spout bridle of their own and ordered only all of the remainder of the equipment from Archer, or to assume that someone else supplied it when certainly such information was readily available, if a fact, from Pacific."

• • •

(page 6)

"Yet the evidence is reasonably conclusive that there was a bridle and bridle seat in the functional equipment delivered and used by both Pacific and Harlin.

Under such circumstances, it appears to us clearly and squarely THERE WAS AN ISSUE OF FACT WHICH THE JURY DETERMINED IN FAVOR OF THE PLAINTIFFS. • • •

We do not believe that the evidence which we have reviewed considered most favorable to the plaintiffs so overwhelmingly favors the defendant that no contrary verdict based on the evidence could ever stand." (Emphasis added)

The Supreme Court of Illinois has said that "it is not open to us to weigh the facts," [*Schneideman* v. *Interstate Transit Lines*, 401 Ill. 172, 81 N.E. (2d) 861 (1948)] and the facts as determined by the Intermediate Appellate

Court are conclusive. *Corcoran* v. *City of Chicago*, 373 Ill. 567, 27 N.E. (2d) 451 (1940) ("This Court is without jurisdiction to determine whether or not the Appellate Court correctly analyzed the evidence"—page 580).

Nevertheless, the Supreme Court of Illinois expressly disagreed with the facts as determined by the Illinois Appellate Court in the case at bar and proceeded to re-weigh the evidence until it found a diametrically opposite result, namely, that the "overwhelming weight" of evidence supported the defendant's position. Thus, a Court which for long disavowed determination of "any" or "manifest" weight of evidence is suddenly determining "overwhelming weight" of evidence.

What "overwhelming weight" of evidence means has not been defined by any discernible standards. In the *Pedrick* opinion the Illinois Supreme Court indicated that the presence of "slight" evidence does not prevent direction of a verdict. In the case at bar, therefore, what was rejected as only "slight" evidence was all of the plaintiffs' evidence as summarized in the Court below as follows: (Plaintiffs' Brief, pages 34-35)

> "In this contention, and its rationale, the defendant errs because evidence traced manufacture. sale and delivery of the product to Archer, established a factory defect, namely a painted faulty factory weld, in the Archer product as the proximate cause, and there was ample evidence of injury and damage for a prima facie case precluding judgment n.o.v. More specifically:
>
> a) There is positive testimony that the pin came with the tower and no part of the tower was missing.
>
> b) There is positive testimony tracing the admittedly defective eye pin to point of manufacture by

reason of the pin containing an insufficient 'factory' weld which was covered over by an Archer 'factory' paint.

c) There is positive testimony negativing the addition of any eye pin, as well as negativing any field repainting or repairing of it.

d) The defendant's concessions as to both the sale and plausibility of the fact of delivery of a bridle and pin by Archer are supported by positive evidence that:

i) other parts of the tower were admittedly supplied without being specifically invoiced;

ii) the eye pin was a stock item without catalog number;

iii) the defendant's ancient catalogs supported the plaintiff because:

a) there was positive evidence that the design changed over the years and modified designs were shipped in later years under old catalog numbers;

b) according to the ancient catalog the bridle seat is referred to as a bridle, and the bridle supplied as part of the instant tower is identical to the bridle that Archer was manufacturing in 1926;

c) by the time of sale in 1953 the bridle assembly was a single catalog item (thing or piece), and the erection drawings had no directions for assembly of a bridle and a separate bridle seat."

Why all this evidence is "slight" while other plaintiffs can get their case to the jury by merely a "presumption" is not easily understood or readily apparent. *McElroy* v. *Force*, 75 Ill. App. (2d) 441, 220 N.E. (2d) 761 (1966) (holding that ownership of a vehicle gives rise to a presumption that the owner was in control of the vehicle

and the presumption makes out a prima facie case upon which plaintiff is entitled to recover); *Winston* v. *Sears Roebuck,* 88 Ill. App. (2d) 358, 233 N.E. (2d) 95 (1968) (directed verdict for defendant reversed saying, "However, a prima facie case can be created by inference or presumption" of agency). Similar results obtain where the case is close on the facts and turns on the jury's willingness to infer or not infer the key fact. "Where the evidence is conflicting, the verdict will not be set aside even though it may be against the weight of the evidence." *Corcoran* v. *City of Chicago,* 373 Ill. 567, 580, 27 N.E. (2d) 451 (1940).

It is common knowledge that if the jury believes certain witnesses, the evidence may then all weigh in favor of one party, and if it does not believe such witnesses the opposite result may obtain. Assessing credibility is an important part of weighing evidence. The criteria of "overwhelming" weight or "slight" evidence as a legal quantum of proof is ambiguous and illusive and can be used to reach just about any result. The fact that reasonable legal minds have differed as to the conclusion to be reached in this case is itself considerable proof that a classic issue of fact exists. Even on summary judgment (Illinois or Federal) where the same question of triable issue of fact is being determined, overwhelming weight of evidence is not involved. How can the law justify resolving the same issue by such diverse principles of law? One litigant obtains one determination and another litigant similarly circumstanced gets entirely different determination depending on what motion is used.

If one litigant can make out a prima facie case with an inference of agency, why is the Appellate Court's

statement of evidence and its expressly stated inference in the instant case "that the boom spout bridle came with the equipment" insufficient to make out a prima facie case for these plaintiffs or constitute some evidence (as in *Robinson* v. *Workman*) to prevent judgment n.o.v.?

How can the law justify such arbitrary and chameleonic results all flowing from "inferences"?

The life of the law is logic—not fiat.

C. Fourteenth Amendment Violated by 1967 Judicial Abrogation of Right to Jury in Undetermined Class of Prima Facie Cases and Applied to 1954 Injuries Resulting in Nullification of 1964 Verdicts Aggregating Over $300,000.

When the instant plaintiffs' actions accrued and were determined, it did not matter if one understood the legal quantum of "slight" or "overwhelming" because if there was "any" evidence, even a presumption, the prima facie case could not be taken from the jury. The Supreme Court of Illinois thus improperly imposed a greater burden than plaintiffs would otherwise have had. *Armstrong* v. *Manzo,* 380 U.S. 545 (held that action of State Court in decree complained of unconstitutionally forced petitioner for certiorari to assume a burden of proof he would not otherwise have). The Illinois Constitution purports to keep the right to trial by jury inviolate "as heretofore enjoyed" (Illinois Constitution, Art. 2, §5) and it has been held that the interpretation of the State Constitution must be consistent with Federal Constitutional requirements, which applies to trial by jury because the due process clause of the Fourteenth Amendment guarantees a fair trial. *Braley* v. *Gladden,* 403 F. (2d) 858 (9th Cir., 1968).

Thus, this case does not present a question of simply an erroneous judgment by a State Court. It is much more than just a result adverse to the plaintiffs. It is the adoption of a vague and ambiguous principle for directed verdicts by which the Supreme Court sitting as a jury retroactively applies and in certain arbitrary classes of cases abolishes a remedy which before the principle was a vested right to a jury trial. A right is vested if it exists as more than a mere expectation. *Adelman* v. *Adelman*, 296 N.Y.S. (2d) 999, 58 Misc. (2d) 803 (1969); 2 Cooley, Constitutional Limitations, page 756 ("But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract or from principles of common law, it is not competent for the legislature to take it away.")

This Court has held that the federal guaranty of due process extends to state action through its judicial branch. *Brinkerhof* v. *Hill*, 281 U.S. 673 (1930). In the cited case, this Court, upon granting certiorari to the Supreme Court of Missouri, held that the State through its Judiciary may not destroy existing remedies. There the record, referred to in a footnote, indicated that part of the issue arose from the State Supreme Court's doubting that evidence warranted a particular finding (page 677).

The Direction of a verdict thrusts at the very heart of the constitutional right.

> "Directing a verdict for the defendant in the instant case denied to plaintiff the constitutional right of trial by jury. *Schneideman* v. *Interstate Transit Lines Inc.*, 331 Ill. App. 143, 72 N.E. (2d) 705, affirmed 401 Ill. 172, 81 N.E. (2d) 861 and cases there cited." *Fortney* v. *Hotel Rancroft*, 5 Ill. App. (2d) 327, 125 N.E. (2d) 544 (1955).

This Court has often made similar pronouncements: (page 35)

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade,* 135 U.S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co., supra,* 68; *Bailey* v. *Central Vermont Ry.,* 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence causation or any other factual matter, cannot be ignored. COURTS ARE NOT FREE TO REWEIGH THE EVIDENCE and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.
>
> Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. THUS TO ENTER A JUDGMENT FOR RESPONDENT NOTWITHSTANDING THE VERDICT IS TO DEPRIVE PETITIONER OF THE RIGHT TO A JURY TRIAL." *Tennant* v. *Peoria & P.U. Ry. Co.,* 321 U.S. 29, 35 (1943). [Emphasis added]

The *Pedrick* principle as applied by the Supreme Court of Illinois sitting as another jury abolishes a substantial

constitutional right and violates federal constitutional requirements as set forth in the Fourteenth Amendment.

As this Court so aptly stated: (page 682)

> ". . . While it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhof* v. *Hill,* 281 U.S. 673, 682 (1930).

D. Certiorari Lies to Review Federal Question Arising in Highest Court of State and Raised by Petition for Rehearing.

This question arose for the first time in the opinion of the Supreme Court of Illinois where the plaintiffs first became aware of that Court's assumption of the role of a jury and the ambiguity of the *Pedrick* principle which arbitrarily destroyed plaintiffs' remedy assessed by the jury in the sum of over $300,000. The jurisdiction of this Court is invoked under 28 USCA Section 1257 (3).

A judgment of a State Supreme Court which infringes a federal right is reviewable by the United States Supreme Court even though the federal question was first presented to the State Court by a petition for rehearing which was denied without reference by the Court to the federal question. *Brinkerhof* v. *Hill,* 281 U.S. 673 (1930), (certiorari to Supreme Court of Missouri); *Great Northern Ry.* v. *Sunburst,* 287 U.S. 358 (1932), (certiorari to Supreme Court of Montana).

It is respectfully submitted that what is being done with the right to trial by jury deserves this Court's attention and warrants the issuing of a writ of certiorari to the Supreme Court of Illinois in the instant case.

Respectfully submitted,

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APPENDIX A

Docket No. 41784—Agenda 31—September, 1969.

PAUL SCHMIDT, *et al.*, Appellees, *vs.* ARCHER IRON WORKS, INC., Appellant.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

Paul Schmidt brought this product liability action in the circuit court of Cook County to recover from Archer Iron Works, Inc., for personal injuries he received when part of a tubular concrete pouring tower allegedly manufactured by Archer fell upon him at a bridge construction site at which he was employed. In separate counts, Schmidt's wife sought damages for loss of consortium, and an insurance carrier sought subrogation for workmen's compensation payments made on behalf of Schmidt's employer. Following the reservation of Archer's motion for a directed verdict made at the close of all the evidence, the jury returned verdicts for Paul Schmidt in the amount of $250,000, for his wife in the amount of $15,000, and for the workmen's compensation insurer in the amount of $35,871.58. The trial court vacated the jury verdicts in favor of the plaintiffs, granted Archer's post-trial motion for judgment *n.o.v.*, and conditionally denied Archer's alternative motion for a new trial. On the plaintiffs' appeal the Appellate Court, First District, reversed the judgment and remanded the cause with instructions to reinstate the judgments on the original jury verdicts. (98 Ill. App. 2d 82.) We allowed Archer's petition for leave to appeal.

(Supreme Court Opinion)

The facts are fully set forth in the opinion of the appellate court, and we restate them only to the extent necessary for the determination of the issues on this appeal.

It is undisputed that the instrumentality which caused Schmidt's injury was a metal "eye" pin used to secure a concrete pouring chute to a 104-foot-high tower in such a way that the pouring chute could be rotated to channel the flow of concrete in various directions. On August 5, 1954, as a result of a separation in a factory weld which had bonded two parts of the eye pin together, the uppermost chute in the pouring system fell and struck Schmidt, who was working near the base of the pouring tower, injuring him severely.

It is incumbent upon a plaintiff in a product liability case to prove that his injuries resulted from an "unreasonably dangerous" condition of the product and that "the condition existed at the time it left the manufacturer's control." (*Suvada* v. *White Motor Co.*, 32 Ill. 2d 612.) This case is unusual in that it is undisputed that the eye pin was defectively manufactured and that this defect was the proximate cause of the plaintiff's injuries. The narrow issue before us is whether there was sufficient evidence that the defendant furnished the defective pin to justify the jury's verdict.

The record shows that in August of 1953 Pacific Bridge Company, a bridge contractor, ordered through the Victor L. Phillips Co., a dealer in construction equipment, a concrete pouring tower and certain accessories. In response to this order, the Phillips Company placed a purchase order with Archer for the following items:

"1—104'	Archer Heavy Duty Single Well 2-WB Tubular Tower Complete
1—506	42 Cu. Ft. Concrete Bucket
1—508	50 Cu. Ft. Tower Hopper with Dumping Chute
1—513	Boom Spout Bridle Seat
2—30HS	30 ft. Swivel Head Chutes
1—501	10 ft. Std. Taper Chute"

A boom spout bridle seat is a bracket-like device used for bolting a boom spout bridle securely to a sliding frame affixed to the legs of the tower. A boom spout bridle is a swivel mount upon which the pouring chute rests in a V-shaped bridge. An integral component of the boom spout bridle is an eye pin functionally equivalent to the one which precipitated the accident in the case at bar. The eye pin is a stock item for which there is no separate catalogue listing. It is a component part of a boom spout bridle, and in the Archer price list, from which the Phillips Company obviously prepared its order, it is listed under a separate number and with a separate price: "List No.: 18 Boom Spout Bridle $38.00."

The evidence clearly shows that neither a boom spout bridle nor an eye pin was specifically mentioned in the Phillips purchase order to Archer, in Archer's shop order, or in Archer's invoice for the merchandise. Whether Pacific specifically ordered the bridle and pin from Phillips does not affirmatively appear; nor does it appear whether Phillips had the critical items in stock itself or whether it procured them from some source other than Archer. The record is similarly silent as to what specific items of equipment were shipped to Pacific, precisely when and where they were delivered, or who, if anyone, had access

to them during the interval before assembly. It is clear that several days after delivery when Pacific's workmen began to assemble the tower from the parts that had been placed on the river bank, they were able to construct a complete tower fully functional for the purpose of pouring concrete. They were able to do so without adding, purchasing, repairing, or field-welding any parts.

After Pacific had used the tower it dismantled it, returned it to the river bank and nine months later sold it to the E. L. Harlin Construction Company, plaintiff's employer. During this interval, the dismantled pieces of the tower lay unboxed and untended on the river bank. The bill of sale from Pacific to Harlin described the identical items that appeared in Phillip's order from Archer. It identified those items by Archer's price list numbers. Harlin resembled the tower without adding, repairing, or field-welding any parts and again had a fully functional pouring tower, including a bridle assembly and eye pin. It was after this second assembly and approximately 13 months after the tower was sold to Pacific that the pin failed, causing the plaintiff's injuries.

Officers of Archer Iron Works testified unequivocally that the pin in question was not manufactured or supplied by that company and did not resemble the pins it usually produced. A second pin, identified by Archer's officers as the type of pin they always manufacture, appeared to be substantially different in character from the pin which actually caused the accident. Evidence favorable to the plaintiffs, on the other hand, shows that the pin in question had been factory welded and painted the same rust color with which Archer painted the other parts of the

tower; there is no evidence that it had been rewelded or repainted in the field. On the basis of these facts, the trial court concluded that the plaintiffs had adduced no evidence, direct or circumstantial, that Archer had manu factured, sold, or delivered the pin. The appellate court disagreed. In our opinion the judgment of the trial court was correct.

In *Pedrick* v. *Peoria and Eastern R.R. Co.*, 37 Ill. 2d 494, 510, after an exhaustive review of the relevant case law in this and other jurisdictions, we held that directed verdicts or judgments *n.o.v.* should be entered "only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." Applying this rule to the facts of this case, we agree with the trial judge that the evidence viewed most favorably to the plaintiffs so overwhelmingly supports the defendant's position that no contrary verdict based on that evidence could ever stand.

The plaintiffs' evidence failed to establish sufficient connection between the admittedly defective pin and Archer. The defendant offered uncontradicted testimony that it did not manufacture the defective pin and that the pin was unlike any that it had ever produced. The plaintiffs showed only that the eye pin in question broke at a factory weld and that it was painted a rust color similar to the other parts of the tubular tower. In view of the evidence that many other equipment-supply manufacturers paint their parts and accessories with a protective rust-colored coating, that evidence shows no more than that Archer was one of several possible manufacturers which could have supplied the pin.

(Supreme Court Opinion)

There was no direct chain of documentary evidence linking the bridle and pin to Archer. The plaintiffs contend that in the context for which the apparatus was ordered the word "complete" in Phillips' purchase order to Archer and in the Pacific bill of sale to Harlin contemplated a fully operational concrete pouring tower including the parts necessary to allow rotation of the pouring chutes. But this argument overlooks the fact that both of these documents specified other items necessary to the functioning of the tower. They also place great emphasis on the fact that approximately two days after delivery of Archer's material at the river bank, workmen were able to assemble from that material a fully functional concrete pouring tower, including a boom spout bridle and eye pin, without adding, purchasing, or repairing any parts. The possibility is not negatived, however, that Phillips either had a boom spout bridle and eye pin in stock or procured these parts from a source other than Archer and had them delivered to the construction site during the two-or-three-day interval in which the Archer material lay untended on the river bank. It is also pertinent in this regard that the defective pin which ultimately caused Schmidt's injuries was found in the apparatus 13 months after its original sale, after it had passed through two hands, and after it had lain untended on the river bank near the construction site for nine months.

The judgment of the appellate court is reversed and that of the circuit court of Cook County is affirmed.

Appellate Court reversed; circuit court affirmed.

APPENDIX B

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PAUL SCHMIDT, JANE W. SCHMIDT and LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation, individually and as use benefitee of E. L. Harlin,
Plaintiffs-Appellants,
vs.
ARCHER IRON WORKS, INC., a corporation and A. T. SCANNELL and W. F. SCANNELL,
Defendants-Appellees.

Appeal from Circuit Court Cook County

Hon. William Daly, Judge Presiding

Mr. Presiding Justice Smith Delivered The Opinion Of The Court:

Plaintiff, Paul Schmidt, was awarded $250,000 for injuries sustained when a part of a tubular tower then being used for pouring concrete fell upon him. His wife's suit for loss of consortium resulted in a $15,000 verdict and his Workmen's Compensation insurance carrier was awarded $35,871.58 on its subrogation claim. The trial court set aside the jury verdicts, vacated the several judgments and entered judgment notwithstanding the verdict for the defendant-Archer and conditionally denied defendant's motion for new trial. Plaintiffs appeal.

The tubular tower and equipment was used for pouring a concrete shore approach for a bridge across the Missouri River. It was about 104 feet in height and quadrangular in shape. The concrete was elevated in a bucket, dumped into a hopper and manually poured into a chute which channeled it by gravity flow to its proper place on

the bridge approach. There was a swivel operating device consisting in part of what is termed a boom spout bridle and bridle seat assembly. The evidence is conclusive that there was an "eye" pin 1¼ inches in diameter and 8 inches in length, a part of this assembly, which broke at a factory weld and permitted the chute to disengage at its tower end and plunge downward on the plaintiff. There is no issue in this case as to what happened or how it happened or whether or not the pin was defective nor the extent of the injuries. The defendant denied that it made, sold or assembled the pin in question and the trial court directed the verdicts on the theory that the plaintiffs' evidence wholly failed to show that the defendant made, delivered or furnished the pin.

Archer had for many years been engaged in the manufacture of both wooden and tubular construction towers and accessories for such towers. The tower in question was manufactured by Archer in response to an order from Victor L. Phillips Company, not a party to this suit, and a dealer in construction machinery and supplies. It was shipped to Pacific Bridge Company, not a party to this suit, at North Jefferson, Missouri, and delivered in boxes on the banks of the Missouri River. Pacific had the tower and its accessories constructed on a man-made island near the bridge approach, used it for their purposes, dismantled it and returned it to the banks of the Missouri River, unboxed, and thereafter sold it to Harlin Construction Company, who was plaintiff's employer. The plaintiffs' testimony clearly establishes that the steel workers who erected this equipment erected a tower completely functional for pouring of concrete. In so doing, they did not add any parts, purchase any parts,

or repair or weld any parts. It is fair to say also that after the equipment was dismantled, it remained on the banks of the river for some considerable time and Harlin then reconstructed it without likewise adding any material or equipment and had a functional piece of equipment. Harlin did, however, add to the tower a type of platform upon which an employee could stand and manually operate the chute. As we view it, the change in construction is in no way material to the issues. There is no affirmative evidence that any part of this equipment was manufactured or purchased elsewhere than from Archer. The evidence on behalf of the defendant shows that a boom spout bridle seat was ordered, but a boom spout bridle is not mentioned. Neither the order, the invoice nor Archer's shop order specifically include a boom spout bridle and it is the defective pin in the boom spout bridle that is the item whose failure is responsible for the injuries sustained. The pin is an essential, single unit, and integral part of the bridle. The bill of sale between Pacific and Harlin does not specifically include a boom spout bridle. There is therefore no documentary chain of title connecting Archer with the specific piece of equipment which caused the injury. The record is silent as to what items of equipment were specifically shipped to Pacific, whether it was delivered to Pacific on the banks of the river or to some other location or who, if anyone, had access to the equipment between the purchase by Pacific and the purchase by Harlin. The trial court, therefore, concluded that the record was totally devoid of any evidence by the plaintiffs tracing the source of the pin to Archer and that this was particularly true since there was an unequivocal denial by Archer that it was manufactured or supplied by them.

(Appellate Court Opinion)

Archer's catalog and the testimony establishes that over the years Archer manufactured parts and accessories for multiple-purpose wooden and tubular towers. The use of the tower determines the accessories ordered and in each instance the assembling of the tower unit was by the contractor on the job and not by Archer. It is clear from the 1926 catalog that a boom spout bridle is necessary to convert ordinary spouting into a boom spout on the job. It is equally clear from the 1929 catalog and the testimony that "whenever spouts are to be hung off from the tubular tower, the first section is supported on the sliding frame under the tower hopper with a boom spout bridle. This bridle bolts to sliding frame under hopper in hole provided". This legend is directly opposite a photograph of the boom spout bridle seat. Both were a part of the equipment used on the job. In the hands of both Pacific and Harlin, they had this swivel type equipment functional for channeling the concrete in various directions without the necessity of moving the tower. Pacific assembled and used it for just such purpose, dismantled it and then within a few short months sold it intact to Harlin. It is thus clear that either the boom spout bridle was shipped by Archer to Pacific or Pacific got it elsewhere. If Pacific got it elsewhere, it is not likely that the plaintiffs would have produced such testimony or if producible would have considered that it had any suit against Archer under such facts. Defendant is correct in stating that they are not obliged to prove the plaintiffs' case. On the other hand, it is but common sense that if it was provable that Pacific did acquire this boom spout bridle elsewhere, Archer had an impregnable defense. It strains credulity to the breaking point to be-

lieve that such a defense was available and not used. With a tower completely functionable on a swivel basis the reasonable inferences are that the boom spout bridle came with the equipment.

Three different pins were offered in evidence and considered by the jury. The first was offered by the plaintiffs and was the pin which was taken from the tower after the accident to Capital Machine Shop in Missouri, repaired, replaced and used by Harlin until the job was completed. Defendant and his engineer denied that Archer ever made a pin like it. A second pin was produced by Archer and identified as the type of pin they always manufactured and it is clear that it is substantially different from the one offered by the plaintiffs. A third pin offered in evidence by the defendant was obtained from the Perry Farm where this tower was reassembled for the purpose of taking pictures used in this lawsuit. The testimony shows that the damaged pin had been removed, marked and a duplicate pin provided. Obviously this pin was not prepared by Archer. It is thus clear that neither of the two pins identified by the defendant and offered in evidence were the pins involved in the injury. We think the evidence clearly shows that the pin offered by the plaintiffs was the pin involved in the accident. Was it a part of the equipment furnished to Pacific?

An officer of Archer testified as to the function of a boom spout bridle that "it is my understanding that the one shown in the catalog that the function is to connect the chute to the boom spout bridle seat. I am referring to catalog 1026. It bears No. 18 in the catalog numbering

system of this 1026 catalog" and again when called on behalf of the defendant, he was asked this question, "Just the one number, number 18, covered both the boom spout bridle and the related pin whether it be Defendant's Exhibit 6 or Defendant's Exhibit 22 or Plaintiff's Exhibit 32A, whatever pin would be used to fit into the boom spout bridle seat, that pin with the boom spout bridle which was attached to the chute was in your organization a single item?" Answer "Yes". It thus seems reasonably clear to us that a boom spout bridle and a boom spout bridle seat were essential in the functioning of this equipment, that the defendant company knew the basic purpose for which the tower and the accessories were to be used and that every reasonable inference is that it was supplied to Pacific, that the parallel plates into which the "eye" pin was placed were shown in the catalog as a part of both the bridle and the bridle seat. There was testimony to the effect that the red oxide paint used on the rest of the tower was the same color as that of the defective pin. It seems to us to be pure speculation from this record to assume that Pacific had a boom spout bridle of their own and ordered only all of the remainder of the equipment from Archer, or to assume that someone else supplied it when certainly such information was readily available, if a fact, from Pacific. It is true that the specific item was not ordered, it is true that the specific item was not mentioned in the shop order. It is true that Pacific did not pay the $38.00 price shown on the price list of Archer for the bridle and were not billed for it. Yet the evidence is reasonably conclusive that there was a bridle and bridle seat in the functional equipment delivered and used by both Pacific and Harlin.

(Appellate Court Opinion)

Under such circumstances, it appears to us clearly and squarely that there was an issue of fact which the jury determined in favor of the plaintiffs. It is further shown by the evidence that a platform for raising material was furnished. The platform was not specifically ordered, but it was testified that the platform was a part of the equipment. Neither was the platform specifically ordered or billed. It has been recently held in *Pedrick* v. *Peoria & Eastern Railroad Company,* 37 Ill. 2d 494, 510, 229 N.E. 2d 504, 513:

> ". . . In our judgment verdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

We do not believe that the evidence which we have reviewed considered most favorable to the plaintiffs so overwhelmingly favors the defendant that no contrary verdict based on the evidence could ever stand.

The defendant urges that in any event it is entitled to a new trial because of improper argument on behalf of the plaintiffs and because of the use of improper photographs. We here note that the trial court in its memorandum opinion stated "Thus, if the evidence had established the source of the pin, then there was sufficient evidence for the jury's consideration as to the manner in which the pin was manufactured and there being no substantial error on which to base a motion for new trial, it is denied". We do not deem it necessary to further extend this opinion by a discussion of these matters It is apparent that the trial court did not feel

that they affected the verdict. It is likewise apparent that had the trial court felt that a fair trial was not received, his alternative order would have been to grant a motion for new trial if the judgment n.o.v. was reversed on appeal.

Accordingly, the order of the trial court granting the several judgments n.o.v. are hereby reversed and the cause remanded to the trial court with directions to reinstate the judgments entered originally on the jury's verdict.

Reversed and remanded with directions.

TRAPP, J. and CRAVEN, J. concur.

APPENDIX C

Opinion of Trial Court filed May 20, 1965 which exclusive of caption and signature reads as follows:

This cause coming on for hearing on defendant's post trial motions to enter a judgment in favor of defendant notwithstanding the verdict of the jury or in the alternative to grant a new trial. In support of the defendant's motion for judgment notwithstanding the verdict, the defendant contends that there was no evidence in the record tending to prove that the Boom Spout Bridle, (the alleged failure of which resulted in the injuries of the plaintiff, Paul Schmidt) here in question was manufactured, sold or delivered by the defendant to the Pacific Bridge Co., which company later sold this to the E. L. Harlin Construction Co.

The Court has no purpose of trenching upon the functions of the jury to determine when and under what circumstances negligence has, as a matter of fact, been committed; however, to uphold the verdict finding the defendant guilty, there must be some evidence tending to prove such fact. The damages cannot be assessed upon mere surmise and conjecture as to liability. Logical inferences may be indulged in, but they must be rooted in the evidence. The law requires affirmative and positive proof of actionable negligence upon the part of the defendant as the proximate cause of plaintiff's injuries to warrant the assessment of damages. The causal relation between alleged negligence and the injury must be established by a preponderance of the evidence with reasonable certainty.

(Trial Court Opinion)

Neither the Pacific Bridge Company nor E. L. Harlin Construction Company had any dealings directly with the Archer Iron Works, Inc. What equipment was ordered by the Pacific Bridge Company from the Victor L. Phillips Company is not shown by the evidence. However, on August 3rd, 1953, Victor L. Phillips Company sent a purchase order to the defendant, Archer Iron Works (Plaintiff's Exhibit 48) directing that certain specific articles depicted in the catalogs of the Archer Iron Works (Plaintiff's Exhibits 41 and 42) be delivered to Pacific Bridge Company at Jefferson, Missouri. The numbers on the shop order (Plaintiff's Exhibit 50) and the shipping order of the Archer Iron Works (Plaintiff's Exhibit 49) corresponds with the names of the items and the numbers set out in the Phillips purchase order.

Purchase and sale, by catalog numbers, is a common practice among manufacturers, merchandisers and customers. The shop order and the shipping order list separate charges for each of the articles ordered.

The item in issue in this case did not appear either by name or by number in the purchase, shop, or delivery orders introduced by plaintiff.

Whether this item was ordered by Pacific Bridge Company from Phillips, the record is silent. Whether Phillips had this item in stock or secured it from some other source and delivered it to the Pacific Bridge Company at Jefferson, Missouri, the record does not either establish or refute.

It may well be that the boon spout bridle and the pin in issue were used by the Pacific Bridge Company, and

may also have been used by the E. L. Harlin Company, but the exhibits introduced by plaintiffs themselves failed to establish their connection with the defendant, Archer Iron Works, Inc., but rather, the contrary is clear. Proof, therefore, if any, of the Archer Iron Works as the source of the particular item must rest upon the testimony of the witnesses.

Milburn Schenewerk, an employee of the Pacific Bridge Company, called by the plaintiffs, in his deposition stated:

> "The first time I saw the tower was, if I am not mistaken, it was the day before we started erection of it. It was laying back on the north bank of the river."

Then, skipping some of the quote:

> "I had nothing whatever to do with taking it from the bank to the barge and delivering it to the erection site."

Schenewerk saw it laying on the bank and every part was disassembled. He stated he thought he started work on the tower about two days after he saw the equipment on the bank, but is not positive.

Merrill W. Bird, in his deposition, given on behalf of the defendant, testified he was a bridge engineer during part of the work on the bridge at Jefferson City, Missouri, and later was in responsible charge. He testified he thought that the equipment was delivered by trucks because it was usually delivered that way, which indicates his thought was merely a conclusion based on custom.

(Trial Court Opinion)

There isn't a scintilla of evidence by any witness to show by whom or by what means, or when the items that were laying on the bank of the Missouri River were delivered.

The record is silent as to where in Jefferson City, Missouri, Archer Iron Works made delivery of the items specified in Plaintiff's Exhibit 48. It might have been delivered directly to the bank site. It could have been delivered to Pacific Bridge Company at some other location in Jefferson City, Missouri, and was then carted to the bank site.

There is not a scintilla of evidence in the record to establish who placed the equipment on the bank of the Missouri River or whether or not some material was delivered by the Archer Iron Works and some direct by the Phillips Company or someone else acting on behalf of the Pacific Bridge Company.

Where direct proof is lacking to establish by whom an act is done, then it can only be attributed to one who had the exclusive opportunity to do it. On this motion it is not within the province of the Court to weigh or equate controversial evidence. However, this record is devoid of any evidence by the plaintiffs as to the source of the pin in issue. While on the defendant's part, there is an unequivocal denial that they manufactured or delivered it.

The Court is always reluctant to nullify the verdict of the jury. In many instances, because of circumstances associated with the injury of a litigant, much material evidence is not available at the time of preparation of

the case for trial. However in this instance, the Lumbermens Mutual Casualty Company, a co-plaintiff, was aware of possible litigation at the time of plaintiff's injury, which is evidenced by its request to preserve the pin. The source of the pin might then have either been discovered by contacting the Phillips Company or the Pacific Bridge Company.

However difficult the duty may be, negligence is a positive wrong, and the burden of proving the defendant's responsibility is upon the plaintiff. It was not the duty of the defendant to disprove it.

The record being barren of any evidence that the pin in issue was manufactured, furnished, or supplied by the defendant, Archer Iron Works, the verdict of the jury is vacated, set aside and judgment entered herein for the defendant at plaintiff's costs.

The plaintiff argues the fact that the purchase order of Victor L. Phillips Company (Plaintiff's Exhibit 48) referring to Item No. 104, used the words "tubular tower complete," as if that might indicate that it included the boon spout bridle or that it might be included in Article 513, boon spout bridle seat. However, defendant's shipping order (Plaintiff's Exhibit 49) referring to Item 104, does not use the word "complete." Any special significance to the term "complete" is also dissipated by the fact that there is a price set out for the tower and a separate charge for each of the enumerated items.

Secondly, as to whether it was intended that the boon spout bridle be considered a component part of the boon spout seat is refuted by the defendant's catalogs (Plain-

tiff's Exhibits 41 and 42), which depicted these two pieces of equipment as separate items and there were separate list prices (Pages 2 and 3 of Plaintiff's Exhibit 53).

The fact that one orders a tractor complete would not embrace such appurtenances as a snow plow, grass cutters, harrow, etc., that might be attached and used with the tractor, or the fact that one purchased a vacuum cleaner would not necessarily include appurtenances for cleaning of drapes and furniture.

This is further demonstrated by the price list (Plaintiff's Exhibit 55, Pages 2 and 3) which lists the price of Item 513, the boon spout bridle seat, at $75.00, and for Item 18, the boon spout bridle, the price of $38.00.

On the defendant's alternative motion for a new trial, the evidence or lack of evidence concerning the care or lack of proper care of the equipment during the interval between its delivery at Jefferson City, Missouri and the time of the incident in question, is not particularly pertinent.

The Plaintiffs predicate their case on the failure of the pin, claiming it was improperly welded and that the weld had not been in any way tampered with by the plaintiffs.

Thus if the evidence had established the source of the pin, then there was sufficient evidence for the jury's consideration as to the manner in which the pin was manufactured, and there being no substantial error on which to base a motion for a new trial, it is denied.

Mr. Vogel: If I understand then, if the Court please, the motion for judgment notwithstanding the verdict is

allowed, and in the event it shall be subsequently held that the order is in error, the motion for new trial is denied. That is in accordance with the several cases that required the Court to pass on it.

The Court: Yes.

Mr. Vogel: Thank you very much.

Mr. Nolan: The essential part is actually, I think—I don't want to interrogate your Honor as to what the reasoning is, but essentially you do not feel we proved this pin had its origin at Archer Iron Works?

The Court: Yes. Although there is also a very serious question of the identity of this pin as being the same pin that the Pacific Bridge Company later had delivered or sold to the Harlin Company. The identification is based on the color although Schenewerk testified it was a color common to all equipment brought to these jobs. Other than the color, the witnesses who identified the pin stated they knew it was the same without pointing out any peculiarity or identifying characteristic that would distinguish it. Merely saying it was the same has no probative force. One convicted of larceny on that type of proof of ownership of the article would be reversed. More persuasive, however, is the fact that the very exhibits upon which plaintiffs rely to sustain their case reflect the opposite. Particularly the catalogs which identify the items by number and Plaintiff's Exhibit 55 which lists a specific charge for each item. It is evident some items might be ordered from the catalog to the exclusion of others. This is a common practice.

It was not necessary to order all the auxiliary parts that might be used with the tower. Pages 2 and 3 of the

(Trial Court Opinion)

Plaintiff's Exhibit 42 depict the tower without any ap purtenances or accessories and Pages 4 and 5 depict th tower with definite appurtenances or accessories. Plain tiff's Exhibit 42 also recites that these various accessorie and appurtenances are interchangeable.

From these exhibits it is apparent that all these towers are not used for one purpose but may be used for dif ferent purposes with different accessories.

While there is a serious question as to the identity of the pin in issue being the same one that the Pacific Bridge Company sold to the Harlin Company, in the light of the failure to connect the pin in issue with the defendant, Archer Iron Works, it is not important.

While Plaintiff contends here that the boon spout bridle is a component of the boon spout bridle seat it is not shown by the evidence. The pictures offered as ex hibits by plaintiff show that the boon spout bridle is fastened to the boon spout bridle seat by metal straps holding the parts together with bolts. By removing the bolts the bridle seat and the boon spout bridle can be readily disengaged.

Mr. Nolan: Your Honor, I suggest Mr. Vogel tender an order in accordance with your Honor's opinion today.

Mr. Vogel: May we tender it tomorrow morning?

Mr. Nolan: Or the next day is all right. Thursday is all right.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

PAUL SCHMIDT, JANE W. SCHMIDT and LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation, individually and as use benefitee of E. L. Harlin,

Petitioners,

vs.

ARCHER IRON WORKS, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Now comes the respondent and files this, its Brief in opposition to the Petition by plaintiffs for a Writ of Certiorari to the Supreme Court of Illinois to review the judgment of the Supreme Court of Illinois entered therein on January 28, 1970.

OBJECTION TO JURISDICTION.

The appropriate jurisdictional statute is cited in support of Petitioners' contention that jurisdiction rests in this court. We deny, however, that the jurisdictional re-

quirements are present in this case and object for the reasons that will be apparent hereafter.

QUESTIONS PRESENTED.

1. Whether there is a substantial federal Constitutional question here involved.
2. Whether the Petitioners raised the alleged Constitutional issue in apt time.

STATUTES AND RULES INVOLVED.

Title 28, United States Code, Section 1257.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

SUMMARY OF POINTS AND AUTHORITIES

I.

THE PETITION FAILS TO RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

Equitable Life Assurance Society v. *Brown,* 187 U.S. 308, 23 S. Ct. 123, 47 L. Ed. 190.

Baltimore & C. Line v. *Redman,* 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636.

Galloway v. *United States,* 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458.

Treat Mfg. Company v. *Standard Steel & Iron Company,* 157 U.S. 674, 15 S. Ct. 718, 39 L. Ed. 853.

Gunning v. *Cooley,* 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

People's Savings Bank v. *Bates,* 120 U.S. 556, 7 S. Ct. 679, 30 L. Ed. 754.

Pedrick v. *Peoria & Eastern Railroad Co.,* 37 Ill. 2d 494.

Merlo v. *Coal & Mining Co.,* 258 Ill. 328.

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Adelman v. *Adelman,* 296 N.Y.S. (2d) 999, 58 Misc. (2d) 803.

Armstrong v. *Manzo,* 380 U.S. 545.

Braley v. *Gladden,* 403 F. (2d) 858 (9th Cir. 1968).

Brinkerhoff-Faris Co. v. *Hill,* 281 U.S. 673.

II.

THE SUPPOSED FEDERAL CONSTITUTIONAL QUESTION WAS NOT RAISED IN APT TIME.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, by Wolfson and Kurland, 1951 Ed., Sec. 76, p. 131.

STATEMENT OF FACTS.

We have no objection to a substantial part of the Statement of Facts submitted by Petitioners. Our objection is to the omissions found there. The trial court allowed that portion of defendant's post-trial motion seeking a judgment notwithstanding the verdict and conditionally denied that portion of the post-trial motion which sought a new trial. This was in accordance with the Illinois practice and raises no question which should require the consideration of this Court at this time.

Controlling facts are omitted from the Petitioners' Statement. Positive and uncontradicted evidence was received which established that Pacific Bridge Company ordered certain equipment through a factory in Kansas City, Missouri. This factor, at the direction of Pacific Bridge Company, wrote up an order sheet which appears in the record as plaintiff's exhibit 48 (Additional Abstract, Vol. II, p. 37). This order was transmitted to the defendant and, pursuant to it, a shop order was made. This appears in the record as plaintiffs' exhibit 50. (Additional Abstract, Vol. II, p. 39.) An invoice was furnished by defendant which is plaintiffs' exhibit 49. (Additional Abstract, Vol. II, p. 38.) None of these documents included a boom spout bridle, of which the alleged defective pin was a part.

Uncontradicted evidence was received that the defendant never manufactured a pin of the kind claimed by Petitioners to have been defective. The character of pin consistently manufactured by it is exemplified by the template which is defendant's exhibit 23 and the completed pin which is defendant's exhibit 22 (Additional Abstract, Vol.

II, pp. 48-49). We repeat, none of this testimony was controverted and it stands in this record uncontradicted.

Petitioners have also failed to advise the Court that in the application for leave to appeal to the Supreme Court of Illinois from the judgment of the Appellate Court of Illinois for the First District (*Schmidt* v. *Archer Iron Works, Inc.*, 98 Ill. App. 2d (82), 240 N.E. 2d 794), the *Pedrick* case (*Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494) and the holding therein by the Supreme Court of Illinois were relied on by Respondent and the issue thus raised tendered to Petitioners. No answer to this petition was filed by Petitioners. A provision for the filing of a reply was made in Rule 315(e) of the Rules of the Supreme Court of Illinois.

In the Supreme Court of Illinois following the allowance of its petition, defendant filed an additional brief as appellant. As will appear from this brief, which is, as we understand it, before this Court, the *Pedrick* case was fully discussed and the issue raised thereby again tendered to Petitioners. A responsive brief was filed. Nowhere in their brief did Petitioners raise any question of a federal Constitutional issue, nor suggest that any such question was involved in the appeal then before the Supreme Court of Illinois. It was only after the Supreme Court had rendered its opinion and judgment that Petitioners, for the first time, sought to raise the issue which is here presented.

REASONS FOR DENYING CERTIORARI

I.

THE PETITION FAILS TO RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

The jurisdictional statute invoked by the Petitioners (28 U.S.C. 1257(3)) requires that a substantial federal question be raised in order to merit the attention of the Court. Prior decisional law instructs that where the question asserted is wholly formal, devoid of merit or has been foreclosed by past decisions of this Court, this Court should refuse to take jurisdiction of the litigation. *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311, 23 S.Ct. 123, 47 L.Ed. 190.

It has been settled law for generations that a trial court may direct a verdict or enter judgment notwithstanding the verdict of a jury, without infringing constitutional rights to a trial by jury. It is also clear that reviewing courts may constitutionally set aside a verdict and enter judgment in favor of a party against whom the evidence is insufficient in law. The authority of trial and reviewing courts in this regard has been recognized by many leading decisions and has been incorporated in the rules of practice of both state and federal courts. *Baltimore & C Line, Inc.* v. *Redman,* 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636; *Galloway* v. *United States,* 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458; *Treat Mfg. Company* v. *Standard Steel & Iron Company,* 157 U.S. 674, 15 S.Ct. 718, 39 L.Ed. 853; and see Rule 50, Rules of Civil Procedure for the United States District Courts, and Annotation, *Judgment Notwithstanding Verdict,* 69 A.L.R. 2d 449, 470.

The fact that trial and reviewing courts may constitutionally enter judgment notwithstanding jury verdicts has led the courts of the several States and the federal judiciary to adopt guidelines or formulations which are

of assistance in determining when that authority may be exercised. The Constitution of the United States does not inquire, however, into the propriety of the language adopted by state courts in assisting state judges and practitioners in determining in which cases the direction of a verdict or entry of judgment notwithstanding a verdict, is appropriate. We believe this necessarily follows from an appreciation and regard for the immense diversity of actions brought in state courts and the rules of evidence employed by the states in day to day litigation. The best expression of this concept which we have found is in the decision of this Court in *Galloway* v. *United States,* at 319 U.S. 372, where it is said at page 395:

> "Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa. The matter is essentially one to be worked out in particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe the standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the amendment requires to be followed."

By virtue of the good sense expressed in the foregoing statement, it is clear that the language in the decision of *Pedrick* v. *Peoria & Eastern R.R. Co.,* 37 Ill. 2d 494, cannot be criticized on federal Constitutional grounds. That

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decision requires that the evidence in a case be viewed in its aspect most favorable to the party whose position is attacked. However, it permits the trial or reviewing court to examine the totality of evidence admitted in the cause and to enter judgment if that evidence is overwhelmingly for one party.

The salutary effects of such an analysis are obvious. It protects the party whose case is attacked, yet avoids unjust results where, in a given case, the party seeking relief is clearly or overwhelmingly entitled to it. The *Pedrick* analysis avoids the wasteful and senseless requirement that new trials be granted *ad infinitum* where verdicts based on insufficient evidence cannot be allowed to stand.

With the exception of the statement found in *Galloway* v. *United States,* we have been unable to find that this Court favors any particular formulation of the issue on constitutional or other grounds. Indeed, in at least two decisions this Court has given voice to the same idea embodied in the *Pedrick* decision. We refer to *People's Savings Bank* v. *Bates,* 120 U.S. 556, 7 S.Ct. 679, 30 L.Ed. 754; and *Gunning* v. *Cooley,* 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720. In the latter authority the following expression is found:

> "Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury." 281 U.S., at page 94.

When faced with these authorities, we do not understand how Petitioners can seriously attack the *Pedrick* case as applying a vague and meaningless standard for the direction of verdicts or the entry of judgment notwithstanding a verdict.

Petitioners' Cases Discussed.

The authorities offered by Petitioners do not support their contention that the application of the *Pedrick* rule in this case constitutes a violation of the Fourteenth Amendment.

First, the plaintiffs obtained no "vested right" in the favorable verdicts which were received at the hands of the trial court jury. The cited case of *Adelman* v. *Adelman*, 296 N.Y.S. (2d) 999, 58 Misc. (2d) 803, was a divorce action, the substance of which we do not feel needs to be discussed at length here.

In this case the defendant claimed a vested right in a prior adjudication of limited separation by a court of competent jurisdiction in New York and contended that a statute enacted after a decree giving to a party separated for two years from his or her spouse the right to a decree for an absolute divorce, deprived her of a vested right in the prior adjudication fixing her status. The gist of the opinion was that the decree gave to the complaining party no vested right which could not be abrogated by a proper act of the legislature of the state.

The question of "vested right" is circumscribed by a hard and fast rule. Thus, "Where a case is appealed and pending the appeal the legislature changes the law upon which the action is based, the appellate court must dispose of the case under the law in force when its decision is rendered. (Cooley's Const. Lim.-2d Ed.-381.)", *Merlo* v. *Coal & Mining Co.*, 258 Ill. 328, at page 333. A party does not have a vested interest in the common law of the state in which his action is brought and the federal Constitution

is not a vehicle by which alleged erroneous decisions of the courts of a State as regards State law may be tested. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, at pp. 680-681.

The Petitioners have asserted a strained argument to the effect that the Supreme Court of Illinois has imposed by its decision a greater burden of proof upon Petitioners than was proper. This is erroneous. The Supreme Court has simply held that plaintiffs' evidence was insufficient in law to support the verdicts and this in no way amounts to an alteration of the burden of proof concept. Petitioners cite *Armstrong* v. *Manzo*, 380 U.S. 545. This case is inapt and has no real relation to the issue before this Court. The sole question before this Court there was one of notice. Otherwise stated, was sufficient notice given to the natural father of a child whose custody was in question? No other matter was before this Court. The distinction between the cited case and the one at bar is obvious.

Significantly, the Petitioners here make no claim that they have been subject to discrimination in the application of the *Pedrick* rule. This element serves to distinguish *Braley* v. *Gladden*, 403 F. (2d) 858 (9th Cir. 1968), upon which Petitioners rely. In that case the *habeas corpus* petitioner had been convicted in an Oregon state court, and in the trial proceedings the jury was not furnished with a form of verdict for a finding of "not guilty". This was held to have been a discriminatory departure from state court practice. No issue of that kind is present in this case.

II.

THE SUPPOSED FEDERAL CONSTITUTIONAL QUESTION WAS NOT RAISED IN APT TIME.

The jurisdictional statute invoked requires that questions sought to be reviewed by writ of certiorari must have been "specially set up or claimed under the Constitution." This language has been interpreted to mean that a petitioner must have raised a federal question at the earliest opportunity and preserved it throughout the state court proceedings. Otherwise stated, the state court whose judgment is sought to be reviewed must have been afforded the opportunity to consider and determine the federal question.

We have already pointed out that Petitioners had at least two opportunities to assert a Constitutional right in the Supreme Court of Illinois prior to its judgment. An examination of the petition for leave to appeal to the Supreme Court of Illinois which was filed on behalf of defendant, Archer Iron Works, will demonstrate that the *Pedrick* decision was urged as the controlling decisional law for the instant case. It was argued in that petition that the Appellate Court had misapplied the reasoning of the *Pedrick* case, and that by reason of the rule in *Pedrick*, Archer Iron Works was entitled to a reinstatement of the trial court's judgment.

Against these assertions, the Petitioners had the right to file a reply or answering brief (of substantially the same character as this Brief in opposition). No reply or answering brief was filed and at a later date the Illinois Supreme Court granted leave to appeal from the Appellate Court judgment.

A supplemental brief for Archer Iron Works, as appellant, was filed. This brief again reiterated the position

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that the *Pedrick* case required a reversal of the Appellate Court decision. The brief for Petitioners filed thereafter did not raise a constitutional question. In fact, the *Pedrick* case was listed among the Petitioners' authorities and at page 57 of Petitioners' brief Petitioners urged affirmance of the favorable verdicts "under the criteria of the Pedrick case."

From the foregoing, it is obvious that the Petitioner could not have been surprised by the application of the *Pedrick* rule by the Illinois Supreme Court in its decision in this case. The law is clear that under the circumstances shown, it was Petitioners' obligation to raise such constitutional arguments as were available to them in their brief as appellees, at the very latest.

The ruling precedents have been summarized as follows:

> "In addition, it must appear that the decision of the highest court of the state could not reasonably have been anticipated. Thus, although the state supreme court goes beyond the issues presented by the case made and places its decision upon a ground unexpected in the particular cause, the rule of the 'surprise' cases may not successfully be invoked to excuse the failure to raise the federal question prior to petition for rehearing if it appears that prior decisions of the state court foreshadowed the ruling complained of. In such case appellant is bound to anticipate the probability of a similar ruling in his own case and must raise the federal question *in limine* and properly preserve it throughout the proceedings." Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, by Wolfson and Kurland, 1951 Ed., Sec. 76, p. 131.

CONCLUSION

It is difficult to find any fault in the Opinion of the Supreme Court of Illinois which was written by Mr. Justice Walter V. Schaefer. The Petitioners were deprived of no rights, constitutional or otherwise, by the opinion and decision of the Supreme Court of Illinois. Moreover, their delay in raising the question in apt time forfeits their right to be heard on the issue.

Respectfully submitted,

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IN THE

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

AS TO STATEMENT OF FACTS.

Part of the Petitioners' contention in this Court for Certiorari is illustrated by the Respondent's statements in the portion of its Brief entitled Statement of Facts.

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While Respondent observes that even the trial judge held (as his written opinion in the Appendix to the Petitioners' Petition indicates) that there was a sufficient evidentiary basis for the jury's verdict in favor of the plaintiff so as to warrant the trial judge's denial of the respondent's motion for new trial, nevertheless the Respondent implies that the evidentiary basis supporting the verdicts of the jury should be ignored in favor of the respondent's "controlling facts" which would have supported an opposite verdict in favor of the respondent.

Seizing upon that portion of the conflict in evidence favoring the Respondent, and which was submitted to the jury and rejected by them, the Respondent then argues that the evidence favorable to it is uncontradicted, vehemently repeating that it is uncontradicted. It should be noted, however, that the pin that broke and which defendant said it never manufactured was painted the same color paint as the rest of the concrete pouring tower which defendant admittedly did manufacture. The pin broke at a factory painted factory weld according to positive testimony and the defendant admitted to welding its pins at the factory in the same place as the break in the instant pin. There was also positive evidence that there was no field welding or field painting done on the job and no parts were made on the job or added to the structure. This and much other evidence refuted the possibility that the factory painted factory welded pin in an Archer tower came from elsewhere than Archer.

It is not only not true, as the respondent repeats, that its evidence is uncontradicted, but all of the petitioners' evidence "contradicts" the respondent's evidence and formed the very issue of fact which the jury resolved in favor of the petitioners and which the trial judge held

was supported by sufficient evidence to warrant denying Respondent a new trial.

It is this very issue of fact, and its resolution in favor of the petitioners by the jury, as confirmed by denial of new trial and as upheld by the intermediate Appellate Court as being supported by the manifest weight of the evidence, that the Petitioners assert are the vital essence of the constitutional trial by jury which this Court should protect.

What good is the right to trial by jury in a constitutional, or any other sense, if an issue of fact is resolved in favor of the plaintiff by a jury and the trial judge holds there is enough evidence to deny granting a new trial and the Intermediate Appellate Court finds the verdicts are supported by the manifest weight of evidence but the Supreme Court, by a retroactive change in the rules, reweighs the weight of evidence and disagrees with the jury and the Appellate Court and the conditional ruling of the trial judge as to weight of evidence.

If all these judges can re-weigh the evidence, what is left of the jury's function?

Nor is it true that this issue was not raised in apt time.

The Intermediate Appellate Court decided in favor of the Petitioners. On Respondent's Petition for Leave to Appeal to the Supreme Court of Illinois your Petitioners were aware of the principles that findings of fact by the Intermediate Appellate Court were final and binding on the Supreme Court, which had often said that it would not re-weigh, indeed, did not have jurisdiction to re-weigh, the facts. Cases holding these principles have been cited to this Court in the initial Petition for Certiorari.

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An Answer to a Petition for Leave to Appeal is not required, and being a remedy that is seldom granted, the Petitioners filed no answer to the Petition for Leave to Appeal. There was nothing in the rules of review, even according to Robertson & Kirkham to foreshadow the ruling complained of. Indeed, for the Petitioners to have presumed, contrary to these established principles, would only have resulted in urging the Supreme Court of Illinois, contrary to Petitioners' best interest, to grant leave to appeal.

The granting of leave to appeal by the Supreme Court of Illinois was merely a decision to review the case and not a ruling adverse to the petitioners. It did in no way indicate or suggest that the conventional rules would not apply and that the Intermediate Appellate Court's findings of fact in favor of the Petitioners would not be binding in the Supreme Court. Such a result first became known in the opinion of the Supreme Court of Illinois when it decided the case adversely to the Petitioners. The Petitioners then promptly raised the Supreme Court's deprivation of the constitutional trial by jury in the Petition for Rehearing, a copy of which has been filed of record in this Court.

AS TO RESPONDENT'S REASONS FOR DENYING CERTIORARI.

In its argument under point I, the respondent characterizes the question asserted by the Petitioners as formal, devoid of merit and foreclosed by past decisions of the Court because judgment notwithstanding the verdict is a remedy as old as the Constitution and not inimical to it. From these truisms the Respondent states that reviewing courts may constitutionally set aside a verdict and enter judgment in favor of a party against whom the evidence is insufficient in law.

Without specifying what criteria may properly be used to determine when evidence is insufficient in law, the respondent implies that it does not matter what criterion is employed, the jury function cannot be affected, impaired or destroyed by it.

Of course, this Court knows better than most that any criterion which can never affect the principle it subserves is no criterion at all. None of the cases cited indicate that this Court ever endorsed such a position.

In the celebrated case of *Lavender* v. *Kurn,* this Court has said that the touchstone of judicial review is whether there is an evidentiary basis for the verdict, and other cases cited by the Petitioners indicate directing a verdict or granting judgment notwithstanding the verdict does vitally involve the very essence of the constitutional right to trial by jury. Indeed, it can destroy it.

This Court has said in the *Galloway* case, and other cases, that due allowances must be made for all reason-

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able possible inferences favoring the party whose case is attacked and has granted certiorari where the State Supreme Court doubted that the evidence warranted a particular finding. *Brinkerhof* v. *Hill*, 281 U.S. 673 (1930).

In the instant case the issue is not simply the proper criterion for determining judgment notwithstanding the verdict, but also the substantial change in that rule from the date the cause of action accrued to the date of the second review of the case and the retroactive application of that changed rule, imposing a greater burden of proof on petitioners than they would have had otherwise. This too has been the basis of certiorari by this Court. *Armstrong* v. *Manzo*, 380 U.S. 545.

This Court has been solicitous of other constitutional rights, such as freedom of speech, press, religion, civil rights, and the rights of accused criminals.

The Petitioners believe this Court is no less concerned about the ordinary litigant's right to trial by jury.

If overwhelming weight of evidence is the proper criterion for judgment notwithstanding the verdict, should that not have been the law at the time the cause of action accrued? Does a litigant have a right to know the ground rules in effect when his cause of action accrues? If judicial fiat can "change" the applicable rule between accrual of action and review, why cannot judicial fiat abrogate the rule entirely under the guise of rule changes? If the jury is not "the" fact-finding body, then should not that new principle be expressly stated so all may know?

As this Court has re-examined its age-old concepts in civil and criminal rights, and found some of them to be wanting, it would seem that a re-examination of the right to trial by jury in civil cases is needful and in terms of increasing volume, pressing.

The ordinary litigant's rights to a jury trial are not undeserving of this Court's attention. At one time it salved the former judicial conscience to say that the federal constitution is not a vehicle by which alleged erroneous decisions of a State Court may be tested. The decisions of this Court in the past decade prove otherwise and show that this Court does not close its eyes to injustice or take refuge in legal technicalities.

Years ago it sufficed to follow legal precedent strictly and narrowly, however old. But today the spirit is concern and a high regard for individual rights.

The Respondent uses more space in its brief arguing technicalities of the law than it does in arguing that it is not and should not be liable to the plaintiff as the jury found and the Appellate Court said was supported by manifest weight of evidence.

The fact that so many people disagree as to the result is itself evidence of the presence of an issue of fact. In this context, where a jury and three Appellate Court Judges agree as to the result, it is submitted that no further review within the confines of human legal abilities can accomplish little more than a substitution of one set of opinions for that of the jury, and hence a substantial destruction of the jury system. Where, as here, the further review is accomplished by a court that should not re-weigh the evidence and does so under a changed rule that did not exist when the occurrence took place, the constitutional right to trial by jury is an empty one, though expensively so.

What happens to the Petitioner who is no longer able to provide for his family may be solely his own affair, but what happens to the jury system as it is subjected to

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rule changes that let one get to the jury on a legal presumption but others cannot get to the jury on positive conflicts in evidence, is a matter of concern for all.

It is respectfully submitted that what is being done with the right to trial by jury deserves this Court's attention and warrants the issuing of a writ of certiorari to the Supreme Court of Illinois in the instant case.

Respectfully submitted,

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